

The Domino Effect – What this Supreme Court Decision means for Employers in Ireland

The Supreme Court judgment in *The Revenue Commissioners v Karshan Midlands Limited t/a Domino's Pizza* was published on Friday, 20 October 2023. It is a very welcome clarification and reframing of this complex area of law for businesses and workers in Ireland.

The law on the classification of workers has been in a state of evolution and refinement over the past 25 years in Ireland and elsewhere as new ways of working have developed and with a strong upsurge in the number of gig economy and platform workers. It is important that businesses have clarity on how the courts, the Revenue Commissioners and the Department of Social Protection in Ireland will determine the true nature of a working relationship. The unanimous decision of the Supreme Court is a clear and helpful guide for businesses and workers.

This is a detailed judgment which canvasses the authorities in the UK and Ireland and recentres the applicable "tests" to help businesses and workers pose a series of questions to establish the more likely true character of a given working relationship.

The key points to note in this lengthy judgment are:

1. The Court has clarified the scope of the "mutuality of obligation" test in Ireland. The Court has opted for a more simplified approach to mutuality of obligation, pointing to earlier authorities which confirm that the key analysis is whether there is an obligation to work in exchange for an entitlement to pay. If the response to this is "yes" then this makes a contract *capable* of being a contract

of employment, but it is not determinative of the position. Evidencing "mutuality of obligation" permits the working arrangement to be capable of entering "the employment field".

2. In analysing the mutuality of obligation test, the Court decided that where a worker performs work intermittently for an employer for pay, then it is possible for that worker to be working under a contract of employment even where the employer has no obligation to offer further or future work and / or where the employee has no obligation to accept any future work.
3. In other words, the mutuality of obligation requirement relates to pay for the work done now by the worker. It does not have to extend into the future beyond the current assignment that the worker is engaged on and the obligation on the "employer" is not necessarily to provide or to commit to provide future work or for the worker to reciprocate with a commitment to agree to work. This is a simplified and re-stated test to determine whether an arrangement is capable of being a contract of employment.

"The fact that there are mutual obligations merely ensures that there is a contract, while the fact that the obligations are of work and of payment merely ensures that the contract is capable of being an employment contract. Thus understood 'mutuality of obligation' can carry two meanings and two consequences. Neither entail the necessity for an ongoing obligation."

However, in cases where a worker contends that a contract of employment subsists over periods both when they *are* working and when they are *not* working, then in those cases, the worker will have to evidence a mutuality of obligation over the entire period of work and not just during the periods of active work. It is important to note that this was *not* the situation in the Irish Supreme Court Domino's case where the matter in issue was simply whether *during rostered hours*, the pizza delivery drivers were employees or were in fact engaged as true independent contractors.

The Court reframed the five questions (including mutuality of obligation) that should be posed to determine whether or not a working arrangement constitutes a contract of employment:

1. Does the contract involve the exchange of wage or other remuneration for work? – the mutuality of obligation analysis.
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the worker to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the

court to adjust or supplement any of the foregoing.

In looking at the factual matters which help identify a contract of employment vs an independent contractor agreement as set out above, the Court approved the analysis of the following factors:

1. Can the worker provide a substitute – is it a true right to sub-contract or is it a freedom to refuse to work a shift and have the "employer" substitute the worker? If so, the latter is more consistent with an employment relationship.
2. Is individual personal service required?
3. How much control is exercised over the worker? This means looking at rostering, dress code, equipment, provision of insurance, invoicing, direction to carry out certain tasks in a prescribed manner – in this case the fact that the employer:
 - (a) helped to prepare invoices;
 - (b) directed what the drivers wore; and
 - (c) instructed drivers on working hours and number of deliveries tended to suggested a high level of control and therefore was more consistent with an employment relationship.
4. Are the workers carrying on business on their own account? In this case, the workers:
 - (a) did not take calls directly from customers;
 - (b) they did not take on any economic risk;
 - (c) they worked exclusively at the employer's premises;
 - (d) they did not scale their business to a particular market;
 - (e) overall their ability to maximise their own profits was very limited and constrained by the control of on-site managers; and

- (f) they were required to wear uniforms, carry branding on their vehicles and deliver on those pizzas as directed by manager.

In such circumstances, their economic activities were controlled and restricted by the employer such that it favoured an employment rather than independent contractor character.

The extent to which the worker is "integrated" into the business of the employer remains an important part of the analysis.

The tests require a balance of all factors and the fact that the workers drove their own vehicles and carried their own insurance, on balance, did not outweigh the existence of an employment arrangements.

The Court emphasised the limits of application of the Domino's decision to its particular facts. In particular, the Court noted that it was not expressing any view on the continuity or reckonability of any such employment service by the drivers.

This judgment is very welcome, very clear and closes for now, a decade long analysis of this issue which has resulted in four different forums reaching four different conclusions (or variations on the conclusions). This is a very nuanced issue. Employers are encouraged to consider, in particular now, whether their own individual contracting arrangements require adjustment by reference to the re-stated "tests" to determine the correct legal nature of a working arrangements.

How the Maples Group Can Help

Please reach out to your usual Maples Group Employment Team contact for further advice and assistance with any Irish employment and immigration matters.

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